

(412)644-5754

DATE: MAY 21, 1998

CASE NO: 97-ERA-34

In the Matter of :

ALAIN ARTAYET
Complainant

v.

MORRISON KNUDSEN CORPORATION
Respondent

RECOMMENDED DECISION AND ORDER APPROVING
SETTLEMENT AGREEMENT AND RELEASE
AND DISMISSING THE COMPLAINT WITH PREJUDICE

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended 42 U.S.C. § 5851 (1988 and Supp. IV 1992). A "Settlement Agreement and Release" was executed by Complainant and Respondent's President and Chief Executive Officer on April 17, 1998. A hearing was held before me in Cleveland, Ohio on June 11 and 12, 1997. I issued a Recommended Decision and Order on October 28, 1997. This matter was pending before the Administrative Review Board which issued an Order of Remand dated May 1, 1998 remanding the case to the undersigned for approval of the settlement. I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. 42 U.S.C. § 5851 (b)(2)(A) (1988). *See Macktal v. Secretary of Labor*, 923 F.2d. 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.2d. 551, 556 (9th Cir. 1989).

The agreement encompasses the settlement of matters arising under various laws, only one of which is the ERA. ¶ 1. My review of the agreement is limited to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA. *Poulas v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1, slip. op. at 2 (Sec'y, Nov. 2, 1987).

Respondent states in the agreement that Complainant shall be paid a specified amount. ¶ 2. The agreement provides protections for Complainant with respect to references Respondent shall provide to prospective employers. ¶ 13. Paragraph 4 contains provisions for the payment of attorneys' fees. The parties certify that they have entered into no other agreement. ¶ 20. Accordingly, the parties have certified that the agreement constitutes the entire and only settlement agreement with respect to Complainant's claims.

The agreement provides that the parties shall keep the terms of the settlement confidential with certain exemptions. ¶ 9. As the agreement also specifically provides that the confidentiality provision does not restrict disclosure where required by law and specifically does not prohibit Complainant from providing information to state or federal authorities, ¶ 9-10, I do not find it to be an invalid gag provision. *See Brown v. Holmes & Narver, Inc.*, 90-ERA-26 (Sec'y, May 11, 1994).

However, it should be noted that the Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA), "requires agencies to disclose requested documents unless they are exempt from disclosure . . ." *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services*, 96-TSC-5, slip. op. at 2-3 (ARB, June 24, 1996); *See also Plumlee v. Alyeska Pipeline Services Co.*, 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, slip. op. at 6 (Sec'y, Aug. 6, 1993); *Davis v. Valley View Ferry Authority*, 93-WPC-1, slip. op. at 2 n. 1 (Sec'y, June 28, 1993); *Ratliff v. Airco Gases*, 93-STA-5, slip. op. at 2 (Sec'y, June 25, 1993).

The records in this case are agency records which must be made available for public inspection and copying under FOIA. In the event a request for the inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. § 70.¹

¹ Pursuant to 29 C.F.R. § 70.26 (b), submitters may designate specific information as confidential commercial information to be handled as provided in the regulations. When FOIA requests are received for such information, the Department of Labor shall notify the submitter promptly, the submitter shall be given a reasonable period of time to state its objections to disclosure, and the submitter will be notified if a decision is made to disclose the information. 29

Paragraph 15 provides that the agreement shall be governed in all respects by the laws of the state of Ohio. I interpret this provision as not limiting the authority of the Secretary or the U.S. District Court under the applicable statute and regulations. *See Rondinelli v. Consolidated Edison Co.*, 91-CAA-3, slip. op. at 2 (Sec'y, April 10, 1992).

I find that the agreement, as construed above, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, I APPROVE the agreement and DISMISS THE COMPLAINT WITH PREJUDICE.

DANIEL L. LELAND
Administrative Law Judge

DLL/lwa

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

C.F.R. § 70.26 (e) and (f). If the information is withheld and suit is filed by the requester to compel disclosure, the submitter will be notified. 29 C.F.R. § 70.26 (h).